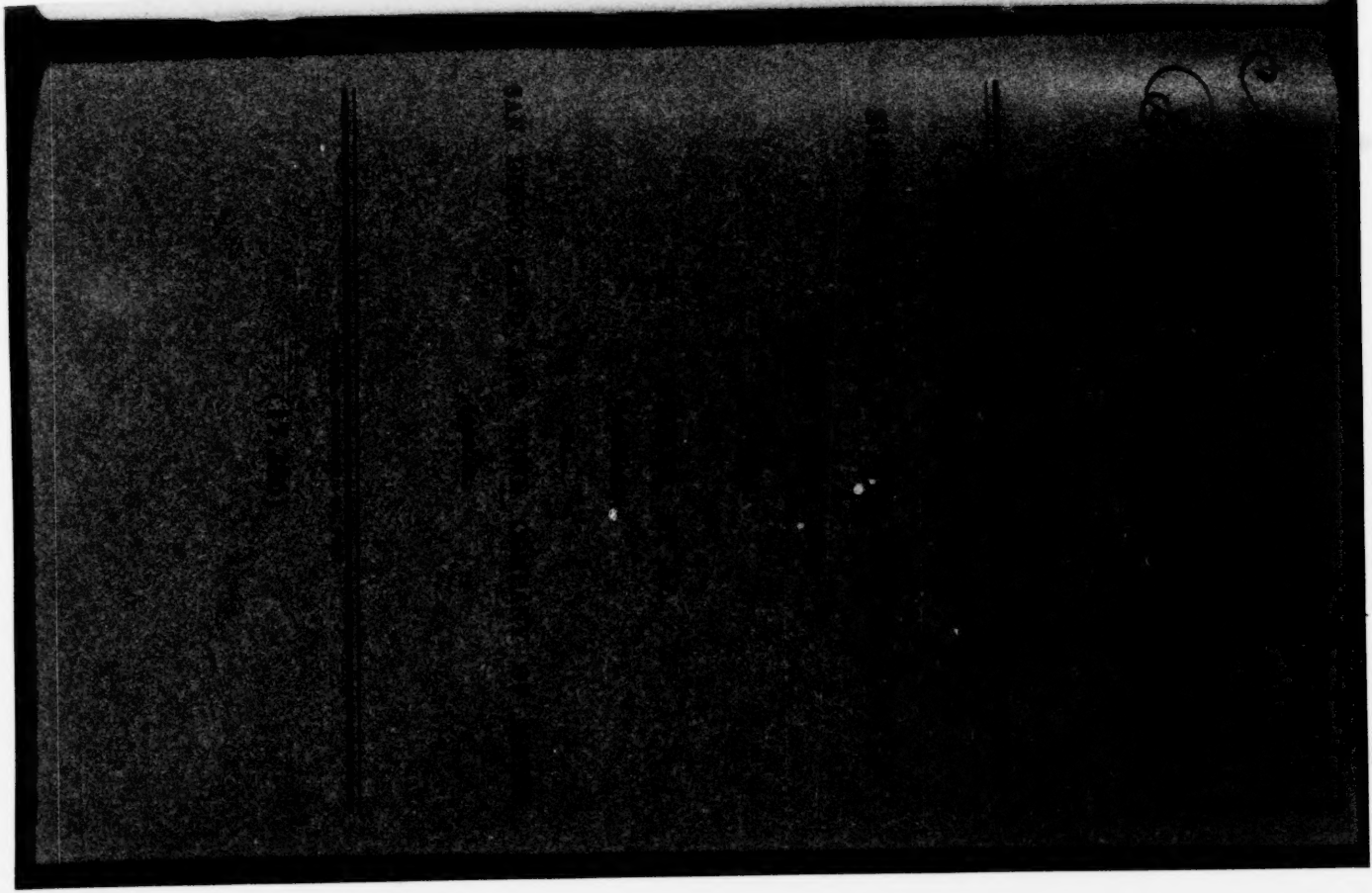

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Supreme Court

of the

United States.

OCTOBER TERM 1899.

No. 201

H. C. OSBORNE, ET AL.,
Appellants,

vs.

SAN DIEGO LAND AND TOWN COMPANY OF MAINE
Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This is an appeal from the decree of the Circuit Court of the Southern District of California, entered December 5th, 1898, dismissing a pure bill of review, filed Aug. 12, 1898, by the appellants as complainants, against the appellee, San Diego Land & Town Company of Maine, a corporation, as defendant; after such defendant's demurrer to the bill had been sustained.

The object of the bill is to review, reverse and set aside, for alleged errors apparent on the face of the record, the final decree entered, in form *pro-confesso*, in the original cause in said court on February 12, 1898, in favor of said corporation as complainant, against said H. C. Osborne and others, the appellants here, as defendants. All the defendants to the decree in the original cause joined as complainants in the bill of review and join in this appeal.

The jurisdiction of this court is invoked upon the whole case, under sub-divisions 4 and 6 of Sec. 5 of the judiciary act of March 3, 1891, on the averments of the answer in the original cause, upon the assignments of error in the bill of review preserved in the assignments of errors filed with the petition on appeal.

The litigation in the original cause, grew out of the effort on part of the complainant therein, Charles D. Lanning, the Receiver, appointed by said Circuit Court, of the San Diego Land & Town Company, a Kansas corporation, to increase the annual rate for irrigation of the lands of the defendants to the original bill, under the water system of the last named corporation, from the then existing rate of $3.50 per acre to $7 per acre: and, to enforce collection of such increased rate against the consent of such defendants.

As a means to this end, Lanning, as such Receiver, caused as stated in the original bill (Trans. p 11) "the water to be shut off from the premises of the defend-

ants"; and for the purpose of obtaining a decree to maintain himself in thus enforcing payment of the demanded increase of rate, filed his bill in the Circuit Court January 6, 1896, and made defendants thereto, the appellants as the users of water from said system, who were outside of the municipality known as National City. The bill of review shows the proceedings in the original suit.

Such original bill set forth in substance:

ORIGINAL BILL.

That the complainant, a citizen and resident of Massachusetts, was appointed on September 4, 1895, by the United States Circuit Court for the District of Massachusetts, confirmed by order of said Circuit Court for the Southern District of California, Receiver of the San Diego Land & Town Company, a corporation organized under the laws of Kansas; that the defendants were residents and citizens of California; that said corporation was the owner of water, water rights and a water system for furnishing water to consumers for domestic, irrigation and other purposes, and of a franchise for impounding, sale, disposition and distribution of water to the defendants and other consumers, and to the City of National City and its inhabitants; that its reservoir is situated in the Sweetwater River, a stream about five miles distant from said National City, and that its system can supply a limited amount of farming lands within and outside of said National City and in part the residence portion of National City;

That up to January 1, 1896, in procuring said water, water rights, reservoir and distributing system and in preparing itself to supply consumers, the Company expended $1,022,473.54, which was reasonably necessary for such purposes.

That by such expenditure, the Company acquired, subject to the public use and the regulation thereof by law, its water, water rights, reservoir site and reservoir of the capacity of 6,000,000,000 gallons, and has constructed and laid therefrom its water mains, pipes and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them and with the premises and buildings of said city and its inhabitants, and to furnish each of them with water, and was at the time in the bill thereafter mentioned furnishing each of them with water.

That the value of said Company's property and franchise necessary for the proper operation of its business and now owned by it is $1,100,000 and that the same is necessary for the use of such company in furnishing water to the defendants and other consumers.

That the defendants are owners, respectively, of tracts of land under the system of said Land & Town Company, most of said defendants owning and holding small tracts of a few acres each.

That each of said defendants has, by purchase or otherwise, become the owner of a water right to a part

of the water appropriated and stored by the company, necessary to irrigate his tract of land, and is liable to pay for the use of said water a yearly rental, such as said Company is entitled to charge and collect.

That the annual expense of opreating and keeping in repair the water system of said Company and furnishing consumers with water is, including interest on its bonds, and excluding the natural and necessary depreciation of its system, $33,034.99.

That in order to acquire and construct its said system of water works, said company was compelled to and did borrow $300,000, and is compelled to pay as interest thereon the sum of $21,000 annually, which sum must be realized from the sale of its water and is part of its operating expenses.

That the proportionate share of the revenues of said Company that should be raised by water rates within the limits of said National City, as compared with the revenues that should be raised and paid as water rates by consumers outside of said city is about one-third.

That in order to pay the said Company the amount of its annual expense and an increase of six per cent on the amount so invested up to January 1, 1896, it is necessary that the rates for water sold and consumed be so fixed as to yield to said company $119,791.66.

That all of the mains and pipes of said Company and other of its property so used in furnishing water to consumers are perishable property, and require to be

replaced at least once in sixteen years and require frequent repairs.

That the total amount that was realized by the said Company from sales of water and water rights and from all other sources, on account of its business of supplying water to consumers, outside of National City, for the year ending January 1, 1896, was about $15,000, and that no more than that sum can probably be realized for the year ending January 1, 1897, at the rates now prevailing.

That the amount that can be realized from said city and its inhabitants per annum from the rates prevailing under the ordinance mentioned in the complaint, is $10,715.00.

That though the franchise and right of said Company to furnish water to said consumers is not exclusive, no other person or corporation is or ever has been furnishing water to the defendants and that there is no other system of water works by which the defendants can be furnished with water.

That the City of National City is a municipal corporation; and that on Feb. 20, 1898, the Board of Trustees of said city, pursuant to the constitution and laws of California, passed an ordinance fixing water rates for water furnished by said Company to consumers within said city.

That said corporation commenced to furnish water to consumers in 1887; that it was then informed by its

engineer that its system, and the supply of water that could be stored thereby, would furnish water to consumers sufficient to irrigate 20,000 acres of land and supply such water in addition, as would be necessary for domestic use inside and outside of said City of National City. That the Company was then unfamiliar with the operation of such a plant and system and did not know what would be the cost of operating and maintaining it.

That relying upon the said report and estimate of its engineer as to the probable duty of its reservoir and capacity of its system, and believing that by fixing and charging an annual rate of $3.50 per acre for irrigation, it could meet its operating expenses and pay it some interest on the investment, it fixed and established and has since charged said rate of $3.50 per acre per annum, and no more, until January 1, 1896.

But that instead of being able to supply from its system water sufficient to irrigate 20,000 acres, it has been demonstrated by its actual experience that said system will not supply water sufficient to irrigate to exceed 7,000 acres together with the water demanded for domestic use, and it is believed not to exceed six thousand acres, although there are 10,000 acres under its system susceptible of irrigation.

That at the rate of $3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and with equal rates for irrigation and domestic use in said National

City, the Company could not pay its operating expenses and maintain its plant and system; that under said rates, it has been and is losing money every year, and its plant and system has been, and is gradually, going to decay, from natural depreciation, consequent upon its use, without revenue or means being provided for replacing the same, whereby the system will be wholly lost to it, and it will, if said rate of $3.50 is maintained, be compelled to furnish water to consumers at an actual and continuous loss.

That in order to pay the cost of operation and maintenance of the plant, and pay the Company a reasonable interest on its investment, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge not less than $7.00 per acre per annum for irrigation purposes and that said sum of $7.00 per acre is a reasonable rate for consumers to pay, and the smallest amount for which said Company can furnish the water without loss to it.

That an increase of the rate for such rentals is necessary to enable the complainant to pay the expense of maintaining and operating said plant.

That by the laws of the State of California, the Board of Supervisors may, on petition of twenty-five inhabitants and tax payers of the county, fix the rate of yearly rental to be collected by any company furnishing water to consumers, but that such petition, has

never been presented or rates fixed in the case of said Company.

That for the above stated reasons said Land & Town Company gave notice to the defendants, that on January 1, 1896, it would establish a rental of $7 per acre, per annum, for water supplied to each of their lands for irrigation, and that from and after said date each of them would be required to pay said sum for irrigation of their respective lands; and that said Lanning, after his appointment as such Receiver, and before said date, gave a like notice.

That the defendants each refused to pay said rate of $7 per acre, and maintain that neither said Company nor said Receiver have any legal right to increase the amount of rental to be paid by any of them, and that the rate of $3.50 established and collected by said Company must be and remain the established rate until a rate is established by the Board of Supervisors of the County.

That in order to enforce the payment of said rentals he has caused the water to be shut off from the premises of the defendants, and each of them, until such rentals are paid; that each of said defendants threatens to and will, unless restrained by the court, commence suit in the Superior Court of the County of San Diego, State of California, to compel the complainant receiver to turn on and furnish water to their said lands without the payment of $7 per acre rental on the ground that they are entitled to the use of said water

for $3.50 per acre, the rate theretofore prevailing; and for damages for cutting off their said supply of water.

That the right of the defendants are the same, and the determination of the right of said Company and said Receiver to increase the rate of rental to be charged and collected, will affect all of the defendants the same, way and to the same extent, except as that the quantity of land owned by each varies.

That the bringing of separate suits of the defendants will involve the Company and Receiver in a multiplicity of suits, and put them to great and unnecessary cost and expense, and will seriously hinder complainant in the proper operation and management of the property of the Company, and the settlement of its outstanding obligations, when all the questions involved and the rights of all the parties in interest can be better determined in one suit and litigation and expense and unnecessary interference with complainant's management and control of the property and business of the Company, can be avoided.

That the proposed increase in rates will add to the revenue and earnings of the Company from the sale and distribution of the water from its said system with the amount of land now under irrigation, not less than $14,000, per annum, and upon the whole of the lands that can be irrigated by the system of the Company, of not less than $21,000, per annum.

The prayer is for an injunction against the defendants from prosecuting in the State Court or elsewhere,

separate actions against the complainant or said Company; that the defendants each be required to set up any claim he has against the right of the Receiver or said Company to increase the rental for water furnished by said Company, and for final decree that such Receiver and said Company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of $7 per acre, per annum, is a reasonable rental to be charged and that each of the defendants be required to pay such rate as a condition upon which water shall be furnished them, and for general relief.

ANSWER.

The defendants, on Sept. 13, 1897, after all their former answers had been expunged, on exceptions filed by the complainant for impertinency, and the defendants had been directed to make further answer, filed their further answer and supplemental answer to the original bill, sworn to by one of the defendants; by an order entered pursuant to thet stipulation of the parties, the oath of any one of the defendants was treated as the oath of all, and the answer was treated as though sworn to by all. (Trans. p. 38).

As the case presents itself (See division II of Argument), the admissions, denials and averments of new matter in such answer are to be taken as the facts in the case. For that reason the substance of the answer is re-stated here.

SUBSTANCE OF ANSWER.

The answer admitted that the complainant, Charles D. Lanning, was appointed Receiver of the San Diego Land & Town Company, a corporation, (hereinafter referred to as "the corporation"), organized under the laws of Kansas, as alleged in the complaint, and that as such Receiver he took possession and management of the property described in the bill. It sets forth the purposes for which said corporation was formed. (Trans. p. 14).

It admitted and averred that such corporation became, as in the answer set forth, the owner of a dam, reservoir and entire water system adapted to furnishing water for domestic, irrigation and other purposes, for which water is needed for consumption; that by reason of grants as set out in the answer, such corporation became the owner in fee simple of all water and riparian rights in the Sweetwater River, and of the bed of the River, from the highest to the lowest point of its reservoir, down to San Diego Bay, a public and navigable water of the Pacific Ocean.

That the corporation commenced the construction of its dam in November, 1886, and prosecuted work upon the same, and upon its mains and lateral pipes, for furnishing water, and by February, 1888, had completed the same; that the capacity of the reservoir is six billions of gallons; that the water system covers and can supply about 9,000 acres of the 12,000 acres of territory thereunder, consisting of farming lands,

within and outside of National City; and in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled on lands within and without National City, of 20,000 persons.

It admitted that in so acquiring the water, water rights, reservoir and distributing system; and in preparing itself to supply the water, the Company expended up to January 1, 1896, a considerable sum of money, but that how much the defendants have neither knowledge, information nor belief.

And it averred that the right and title of the Company to the reservoir and system for furnishing water therefrom to consumers for domestic, irrigation and other purposes, and for collecting rates and compensation therefor, so acquired by it, are subject to the water rights, easements in and servitudes upon the said reservoir and system, and to all other rights acquired by these defendants therein and annexed to their respective parcels of land.

It admitted that the defendants each (with two named exceptions) are the owners of tracts of land under this water system, and that most of them own and hold small tracts of only a few acres each; and averred that none of them own to exceed twenty-five acres irrigated from the system except one, Kimball, who owns about seventy acres; and that all the defendants own their tracts in severalty except that two tracts of twenty acres and two of ten acres, each, are owned by tenants in common.

It admitted that each defendant owning land as set forth in the answer has become the owner of a water right to a part of the water appropriated and stored by the Company, necessary to irrigate his and her land so owned.

And it averred that the water right so owned by each defendant, respectively, extends not only to the irrigation of the respective tracts of land, but also to supplying the needs of persons resident and of animals kept thereon.

It averred that each of such water rights embraces the right and easement of the service of the reservoir and distributing system of the corporation, for the delivery of the water at and upon the respective lands of the defendants for all of those uses by the automatic gravity of pressure under the system; and that each such water right and easement is in freehold and is a freehold servitude imposed upon such water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said Company for the price or compensation therefor have been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged.

It further averred that such water rights extend to and include the right to have the corporation maintain the system efficiently to conduct the water to and deliver the same on the premises of each of the defendants, for irrigation and other uses, at and for the an-

nual rates to be deemed and accepted as the legally established rates therefor under the facts in the answer thereafter set forth.

It admitted that at the times mentioned in the complaint the corporation was furnishing each of them with water through its system.

The answer further allged that of the 12,000 acres of farming and orchard lands under the water system, the corporation in January, 1887, held for sale, use and profit, about 7,000 acres, and that the lands owned in 1887 by others, are in detached parcels scattered among the lands of the corporation. That all of these lands were in January, 1887, entirely unsettled and in the wild and natural state, and almost entirely arid, and of but little value without water for irrigation.

That the corporation acquired its water, water rights, reservoir site, reservoir and distributing system, for the purpose of devoting the same, first to irrigate its own land and to supply the needs of settlers upon such lands, who should be induced to purchase them from the corporation as lands under irrigation.

That the object of such corporation in constructing and acquiring such water system was to enable it to sell its lands as irrigated lands, with the easement of the perpetual flow and use of water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should be settled upon them, annexed as appurtenances in freehold thereto, and to

create the freehold servitudes upon its water system corresponding to such easements. That such water, water rights and water system, to the extent necessary and useful for the irrigation of the lands of the corporation, became a part of its lands and merged in the estate of the corporation in its reality as one estate. And that subject to the purposes so stated, the corporation devoted and appropriated the remainder of the capacity and service of its water system to the sale, rental and distribution of the use of water to the public.

That the corporation in part execution of its such first and primary project for selling its own lands, laid out and platted its tract known as Chula Vista, consisting of about 5,000 acres, in blocks of 40 acres each, subdivided in lots of 5 acres each, and bounded each such blocks by streets and avenues, and laid water pipes, so that its distributing system was made sufficient to reach and serve with water each five acre lot on the Chula Vista Tract, and also to reach its farming lands within National City, Sweetwater Valley, elsewhere within National Ranch, in Otay Valley and in the tract known as Ex-Mission; that nine-tenths of the corporation's distributing pipe system, when laid out and ready for operation in February, 1888, was laid in anticipation of future use and demand for water supply, and not for any use then existing, and that when laid, it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused.

The answer further alleged, that from the inception of its enterprise, the corporation held its farming and orchard lands for sale, and up to January 1, 1896, did, as an inducement to the purchase, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its system was piped to and over its lands and lots, and was, and would be, supplied to purchasers thereof in abundance, for irrigating the same, at the rate of $3.50 per acre per annum, for farming and orchard lands; and that from 1887 up to January 1, 1896, it kept its lands continuously on the market for sale, with and under such representations as to water supply therefor, and as to the annual rate for irrigation of the same; that the lands of the corporation in the Sweetwater and Otay Valleys and in the Ex-Mission, about 5,700 acres, without water from the system, have at no time been worth more than an average of $35.00 per acre, and in Chula Vista no more than $75.00 per acre; that with the appurtenant water supply, the corporation has at all times, since early in the year 1887, treated the value of its lands as proportionately enhanced, and since early in 1887, held its raw lands in the Sweetwater and Otay Valleys and in the Ex-Mission, at an average price of $250 per acre, and in Chula Vista at prices ranging from three to five hundred dollars per acre, except that it offered and sold about six five acre tracts of its Chula Vista lands at $150 per acre, as an inducement to the first few purchasers to locate thereon; and has at all times held its lands, where improved by it with the aid of such

appurtenant water supply, outside of the value of improvements, on the same basis of valuation for land and water.

The answer alleged that up to the date of the suit at such prices, and under the representations that the annual rate for water for irrigation was, and would be, $3.50 per acre, the corporation, had sold to certain of the defendants and to their predecessors in title, severally, parcels of such irrigated lands, outside of National City, aggregating about 1,200 acres, with the freehold easement of water supply annexed, as incident and appurtenant to the land granted; that each purchaser thereof, respectively, relied upon such representations of the corporation that the annual rate for water to be supplied for irrigation, was and would remain not higher than $3.50 per acre; and that in each case of such sale, the corporation, prior to making its conveyance, connected the land with the actual flow of water from its system, both for irrigation and domestic and other uses; and in respect of lands so sold by the corporation in Chula Vista, it exacted from and imposed upon each of the purchasers an obligation to erect a residence thereon at once, to cost not less than $,2000.

The answer further alleged that up to December, 1892, the corporation made no express or separate grant of "water rights" as appurtenant to the lands sold by it, but granted the easement of the flow and use of water from its system as an appurtenant of the land sold, with the land after it had been connected

with the water system and the water had been applied to irrigate the land sold and to the uses of persons living and animals kept thereon; and contracted for and received compensation for both the land and appurtenant water right in a single price for both; that after December, 1892, the corporation, in all cases of sales of its lands by an express contract in writing, specifically sold to those of the defendants who purchased lands from it after that date, the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with the water being adapted to each case respectively) to-wit:

"That in consideration of the stipulation herein con-"tained, and the payments to be made, as herein after "specified, the party of the first part (the corporation) "hereby agrees to sell unto the party of the second "part, and the party of the second part agrees to pur-"chase of the party of the first part, the following real "estate, to-wit: (Description) together with a water "right to one acre foot of water per annum for each "and every of said above described real estate, to be "delivered by the party of the first part through its "pipes and flumes at a point—said water to be used "exclusively on said real estate, and not to be diverted "therefrom. Provided, that the party of the first part "may change the place of delivery of said water, so "long as the same is near the highest point of said "land. For which land and water right the party of "the second part agrees to pay the sum of ——— "dollars.

"And the party of the second part further agrees "and binds ——self ——— heirs, executors and as-"signs to pay the regular annual water rates allowed "by law and charged by the party of the first part for "water covered by said water rights, whether such

" water is used or not, and to pay for all water used "on said land for domestic purposes, monthly, under "such rules and regulations for the delivery of water to "consumers, as the party of the first part may from "time to time make."

The answer further alleged that in character and quality of the appurtenant water rights connected with the land sold by the corporation, no discrimination exists or has at any time been claimed by the corporation, or had at any time been recognized by the purchasers, between the lands sold by it after the inauguration of such water system up to December, 1892, and those sold by it after that date, with the express and specific provisions as above set forth.

The answer further alleged that the title to about 900 acres in the aggregate, lying outside of National City, was not derived from the corporation; that to such lands the corporation furnished water for irrigation to so much thereof as came under cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from its system to such lands, and voluntarily, in all respects, has, from the beginning of its water service, treated and still treats the same, as to water rights, in all respects on the same footing as the lands sold by it as above alleged. And that, from the beginning of its water service in 1887, until now, the annual water rates actually established and collected by the corporation for water furnished by it to land not sold by it,

have been the same as for water supplied to lands sold by it.

The answer further alleged that after December, 1892, such corporation refused to furnish water to irrigate other and further lands under the system, not owned or sold by it, except on payment of a sum in gross for the water right over and above the uniform annual rate as actually established and collected from all lands under the system, or in lieu thereof, six per cent annual interest upon the estimate of the value of such right which it first fixed at $50.00 per acre and later raised to $100 per acre, and only under a form of contract which contained clauses, th material portions of which are as follows (the filling of blanks being adapted to each case):

"That the party of the first part (the corporation) "agrees to and does hereby sell to the party of the "second part a water right to one acre foot of water "per acre, per annum, for each and every acre of the "real estate hereinafter described, to be delivered "through the pipes and flumes of the party of the first "part —— for the sum of ———— dollars, payable "as follows: ————————. Provided the party of "the first part may at its option change the place of "delivery of said water, so long as the same is near the "highest point on the lands for which the water is de-"livered.....said water right is sold for the use of, "and to be appurtenant to the following described "real estate now owned by the party of the second "part....and it is expressly understood and agreed "that the water right hereby sold shall belong to said "described real estate and to be used thereon "and not diverted therefrom or used on any "other lands. In consideration of the forego-"ing stipulation and agreements the party of the sec-

"ond part agrees and bind ——self, ———— heirs, "executors and assigns, to pay the sums above speci- "fied as the sums, and each of them, fall due..... "and that ———————— and they will promptly pay all "annual water rates and charges for the water to "which — ———— is entitled under and by virtue of "this agreement, at rates fixed by the party of the "first part as allowed by law, and at the times, in the "manner, and according to the rules and regulations "made and adopted by the party of the first part, the "annual rental for the amount of water to which the "party of the second part is entitled under this con- "tract, to be paid whether the same is used or not, and "also to pay for all water used by ——— on said land "for domestic purposes at the rates fixed by the party "of the first part and allowed by law."

And that under this form of contract the corporation annexed the water rights referred to in the (original) bill, which are appurtenant to about 400 acres of the lands of certain of the defendants; and at no time has made or claimed, and does not now make or claim, any distinction in respect of the character and quality of the water right, or of the annual rates actually established or collected for irrigation, between such of the lands not purchased from it, as are furnished with water for irrigation by it, whether under such special contract for water right or without.

The answer further alleged that provided the defendant, J. M. Ballou, owns a water right by virtue of a special written contract with the Company, making such water right appurtenant to his land, and for a valuable consideration paid by him to the corporation and containing the following provisions:

"Provided, that said party of the second part shall "make application in the form provided by the Com- "pany, for the use of the water, and use the same un- "der the same restrictions and conditions, and to pay "said party of the first part the current rate therefor, "as established for Chula Vista; provided said restric- "tions and conditions are not inconsistent with the "water right hereby granted to said party of the sec- "ond part."

The answer further alleged that certain of the defendants, who are owners in the aggregate of about 400 acres of what are known as Ex-Mission lands, have annexed to them water rights as alleged in the original bill, entered into a written contract with the corporation for the use and flow of the water to their lands, in which is contained the following:

"The parties of the first part will make application "for use of the form provided by the party of the "second part of that purpose, and pay for the use of "the water at the current rates as may be enforced "from time to time for supplying lands in National "Ranch, and subject to the same general rules and "regulations."

The answer further alleged that on or about June 3, 1895, the corporation established a classification of lands which had been, or which should be provided with water by its system, to take effect July 1, 1895, and afterwards confirmed the same to take effect January 1, 1895, and that said classification has been adopted by the Receiver, and is in words following: to-wit:

"Tenth: For the purpose of fixing rates for irri-

"gating acre property, the lands of that character are "classified as follows:

"All lands to which the easement and flow of water "for irrigation has been, or shall be, annexed, by the "consent or voluntary act of this company, shall con- "stitute the first class.

"All lands to which the easement and flow of water "for irrigation has not been or shall not be annexed "by the consent or voluntary act of the company, shall "constitute the second class."

And that in respect of such second class the corporation at the same time, promulgated the following, to-wit:

"In addition to said annual rate for water used upon "lands of said second class an annual charge equal to "six (6) per cent of the value of the right to said ease- "ment and flow of water for irrigation, which said "value is to be taken as one hundred dollars ($100.00) "per acre."

The answer alleged that the lands of each of the defendants fall within the first class, so defined by the corporation and its receiver. That no discrimination is made or at any time has been made between the lands of the first and second class in respect of the annual rate: that the additional charge of six per cent per annum upon the value of such water rights, applies only to such lands as shall receive the use and flow of water from the system for irrigation on demand of their owners in cases where they shall not have paid or secured to be paid by contract or convention with the corporation, the gross sum demanded by it for the sale of the water right for such lands; and that none of the lands of the defendants fall within the

second class; and that all of the defendants have accepted and concurred in and do accept and concur in the classification of lands as made by the corporation and receiver.

The answer further alleged that the corporation has planted and improved of lands still owned by it, about 1,500 acres outside of National City, using thereon water from its system as appurtenant to such land for cultivating the same, and holds such lands with appurtenant ease ment of water supply for sale; and that it holds the remainder of its lands under its water system, comprising about 4,000 acres to which water has not been actually applied at valuations not less than in the answer before stated for land and the easement of water supply annexed, and refuses to sell or dispose of the same without including the water supply, and except on condition of payment for the price of the land and including the price of a water right so fixed by it, or interest at six per cent, per annum, on the price of such water right at the option of the purchaser.

The answer further stated, that in estimating the annual income from water rents under its water system, the corporation has, from the beginning of its water supply, treated its lands actually irrigated by it, as being precisely on the same footing as to annual rates with the lands of each of the defendants, and has entered upon its books the same rate per acre, per annum, as chargeable to its own such lands, as that

charged to the lands of the defendants. And that the Receiver has done, and does likewise.

The answer further alleged, that the aggregate number of acres of land under irrigation from the system, including the land of the defendants, the corporation and others, does not exceed 4,300 acres, or one-half the capacity of the reservoir and main pipe lines, after allowing for the domestic uses of 20,000 persons; that the actual annual expense of operating and keeping the water system in repair, exclusive of the alleged interest of seven per cent of $300,000 of bonds of the corporation referred to in the bill, does not exceed $12,034.99, as stated in the bill; that the "natural and necessary depreciation of its system," referred to in the bill, is made good by the keeping of the same in repair, the cost of which is included in the annual charges; that the amount of $25,715.00 was collected as water rentals for the year ending January 1, 1896, exclusive of any sums derived from the sale of water rights, and with the annual irrigation rate fixed at $3.50 per acre; and for the year ending January 1, 1897, at the same rate, such rentals will yield $27,000, with but two-thirds of the capacity of the system in use; that no part of these rentals are derived from or attributed to the lands of the corporation not actually irrigated; that, as shown by the records and official reports of the corporation, the actual surplus of receipts for water rentals accumulated in its hands, to the credit of the system after deducting the expenses of operation and maintenance, to December 31, 1894, was $49,699.28.

The answer denied that the corporation is entitled to demand from the defendants any sums by way of water rentals to apply on the demanded income of six per cent or any net income on the alleged cost of such water system; and, denies that either of the defendants own their water rights under such system, subject to any obligation legal or equitable, other than such as arises from the actual rates established and collected by such corporation, which, in case of their lands, is $3.50 per acre, per annum; and, denies that the compensation to such corporation for either of the respective water rights, easements anr servitudes of the defendants, were or are still subject to regulation by any Board of Supervisors of the State of California, under the Act of 1885.

The answer averred, that such of the defendants as have purchased their lands with appurtenant water rights from the corporation, and such of them as have purchased of the corporation water rights made appurtenant to their lands, not bought of the corporation, have each and all paid the full amount demanded by the corporation as the price of the perpetual easement of water supply from its system, by the corporation, granted and annexed to such lands; that such easements are respectively servitudes on the Company's water system, and have been fully paid for; and that the owner of such lands are forever discharged and acquitted from payment of any further sum or sums, to apply upon the principal of, or as income upon, the cost or value of such water system, or any

debt incurred by the corporation in its construction or the value of their respective water rights; that in each of such cases where the corporation devoted water to the public use, it received satisfaction from and parted with to each of such defendants, or his or her predecessor in interest, all right to demand or collect water rentals proportioned to such lands, as corresponded or related to interest or income on the coast or value of the system or net annual receipts or profits therefrom; and that, in said respects, it has at all times put all other lands, to which it has voluntarily annexed such water rights, upon the same footing; that all such lands have r emained on the same footing for more than five years; that such lands have in many cases changed owners, while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the corporation with annexed water rights; that the value of such water rights has, for more than five years, entered into the market value of such lands, and has in all cases been paid for to their vendors by the present owners, those defendants, who are successors in title by mesne or immediate conveyances of the lands to which, during the former ownership, the Company voluntarily annexed such perpetual ease ments and water rights. And that neither any such lands, nor the owners thereof, are in any event liable for any other or further water rentals than are the lands, the ownership of which, with such water rights, were derived from the corporation.

The answer admited that the corporation commenced to furnish water to consumers in the year 1887, and that it did as early as February, 1888, fix and establish, and has since charged the rate of $3.50 per acre as the annual rate for irrigation and no more, until January 1, 1896.

And the answer averred that such annual rate of $3.50 per acre is the only actual rate which has ever been established, or that has ever been collected by the corporation, or which has at any time been paid or assented to by the consumers under the system from the said beginning of such water service down to the time of filing the bill herein; that the rate, so actually established and collected, has, during more than nine years last past, been uniform as to all the lands irrigated under the system, without discrimination in respect of all the lands of the defendants at all times.

The answer further avered, that the defendants were induced to purchase, improve and settle upon their respective parcels of lands, in reliance upon the fact that said rate of $3.50 per acre, per annum, for irrigation, under such system, has, during all said period of time, been uniformly and actually established and collected by the corporation; and that such irrigation rate has entered into the value of all the lands of these defendants and is a material element in such values.

The answer admitted that there is not now, and has not been, any other system of water works by

which the defendant can be supplied with water; it denies that the capacity of the system is sufficient to supply not to exceed 7,000 acres, together with the water demanded for domestic use, and avers that it is of sufficient capacity to supply 9,000 acres, together with the domestic uses of 20,000 persons.

The answer denied that at the rate of $3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, the corporation would not be able to pay its operating expenses and maintain, from such rentals, its plant and system; denies that the corporation has been, or still is, under such established rates, losing money every or any year; they deny that its plant and system has been or is, gradually going to decay from natural depreciation, consequent upon its use in supplying consumers with water, without any or sufficient resources or means provided from such rates for replacing the same; denies that the corporation, if such rate of $3.50 per acre is maintained, will be compelled to furnish water to consumers at any actual or continuous loss; and, deny that if the rentals derived from such system, at the rates actually established and collected, including said rate of $3.50 per acre, are fairly applied to manage, operate and maintain the system, that it will be lost.

The answer denied that in order to pay such corporation its annual expense and and an annual income of 6 per cent on the present cost and value of its system, it is necessary to fix rates for water so as to realize, when the system is wholly employed, the sum of $119.791.66, or any less sum in excess of $32,000 per annum.

The answer avers that neither the present cost nor the present cash value of the whole water system exceeds the sum of $300,000; that not over one-half of the capacity of the same was in use on January 1, 1896, and that not over two-thirds of the capacity of the system is now in use.

It denied that in order to pay the cost of operating and maintaining the system, and pay the corporation as much as six per cent net annual revenue upon the present cost and cash value of its plant, it is or will be necessary to charge a rate per acre, per anuum, of $7 for irrigation purposes, or any sum in excess of $3.50 per acre, per annum, for such purposes in connection with the domestic rate under the system, actually established and collected.

The answer denied that $7 per acre, per annum, or any sum in excess of $3.50 per acre, per annum, is a reasonable rate for the defendants to pay; it avers that each of them is the owner of a right and easement in freehold of the flow and use of water through the system as alleged in the complaint; that the same is appurtenant to their respective lands and that their

lands fall in the first class established by the corporation; that from them the corporation is not entitled to any interest on its investment in the plant.

The answer avered that the sum of $3.50 per acre, per annum, for the use and enjoyment of such easements and maintaining and operating the system has been actually established as aforesaid, and is the only rate wihch has been collected by the corporation for the nine years last past, from the defendants and their privies in title to their lands, and, that no other rate has ever been actually established in respect of their lands or at any time collected; and that said rate is the ample and sufficient contribution of such lands for the maintenance of such works.

The answer averred that each of the defendants and their predecessors in estate, as owners of such lands, for more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of such water upon their land for irrigation, paying therefor the annual sum of $3.50 per acre, per annum; and that such use and enjoyment has been open, notorious, continuous, adverse and uninterrupted. And that they have thereby acquired the right to such water for irrigation on paying therefor the said annual sum per acre; and that such a right is vested in them by the operation of Section 318 of the Code of Civil Procedure of California. And that they are entitled to said water on paying such sum per acre, per annum, and no more. And that the corporation is barred from having or maintaining any action at law or in equity

to change the character of or add to the burden of said easement, or to increase the annual payment for the use of the water, and is estopped to claim any right to change such annual payment.

The answer admitted that by the laws of the State of California, the Board of Supervisors may fix water rates as alleged in the bill, and that no petition has ever been presented or rates fixed in the case of the corporation. It admits that such corporation gave notice to defendants that on January 1, 1896, it would undertake to establish a rental of $7 per acre, per annum, for water for irrigation on the lands of defendants, and that the Receiver, after his appointment, before said date, gave a similar notice.

It averred that at the date of such notice the defendants were in the continued enjoyment of their said water rights an deasements, and were paying and always had paid to the corporation $3.50 per acre, per annum, for each acre irrigated by them. And avers that such notice contained a further demand as a condition to the refraining, by said corporation from shutting off the water supply of these defendants under their respective easements; that each of the defendants should subscribe an instrument upon a printed form designated "Application for Water", which, among other things contained the following:

"This contract shall remain in force until the first "day of next July, when it may be terminated at the "request of either party, notice to be served in writ-

"ing; but in case no such request is made, then the "same shall continue in force for one year thereafter, "and so on, from year to year, until such request is "made, which request, when made, shall be to termin- "ate this contract on the following July 1st."

The answer admitted that the defendants each refused to pay the rate of $7 per acre; that they maintain that neither said corporation, nor its Receiver, has any right to fix the amount to be paid by any of them; and that the rate of $3.50 per acre, per annum, actually established by said corporation by said contracts, conveyances, use and practice, and which rate has at all times been collected and paid for the use of said water, must be and remain the established rate to be paid by the defendants for said use as against such attempt of the corporation and complaint to raise the same to $7 per acre, per annum.

The answer further sets forth the provisions of Article 14 of the Constitution of the State of California, adopted in 1879, entitled "Water and water rights", and the provisions of the act of the Legislature of said State, approved March 12, 1885, entitled "An Act to regulate and control the sale, rental and distribution of appropriated water of this State, etc.", with reference to Section 5 thereof, which said Constitutional and Statutory provisions are copied in the appendix to this brief.

It further averred that such rate of $3.50 per acre, per annum, established by the corporation as set forth in the bill, is the only actual rate for irrigation which has

ever been established and collected by such corporation or its Receiver; that it is the only rate which has ever been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

It denied that any increase of the rate for such rentals is at all necessary to enable the corporation or its Receiver to maintain and operate the plant and pay the proper expenses of said maintenance and operation.

The answer admitted that in order to enforce the payment of the proposed rental of $7 per acre, per annum, the complainant caused the water to be shut off from the premises of each of the defendants until such demanded rental should be paid; and denies that either of the defendants threaten to commence suits in the Superior Court of the County of San Diego, to compel plaintiff to turn on and furnish the water to their lands, or for damages.

The answer admitted that the rights of the defendants are the same to the extent that all are freehold easements as alleged; it admits that the question of the right of the corporation and of the Receiver to increase the rate of rental to be charged and collected will affect all of defendants in the same way, and to the same extent, except that the quantities of land owned by them vary.

It admitted that the proposed increase in rates, if collected from all the lands irrigated under the sys-

tem, including those of defendants, and all others, including those of the corporation, would add to the rentals collected by the corporation for irrigation, any less than $14,000 per annum.

The answer further averred that a rule was adopted by the corporation and the complainant, and in force long prior to Jan. 1, 1896, by which water rentals became due in quarterly payments in advance, commencing with January 1st of each year. And that the same became delinquent in 15 days after due, then the supply would be discontinued and not again renewed until payment was made of all arrearages; that under such rule, on the 4th day of January, 1896, when the complaint was filed herein, the demand of the complainant for increase of rentals was for the quarter year beginning January 1, 1896, and no longer; and that no rental had accrued or become due or payable, at the time of filing the bill herein, except for the first quarter of such year.

That such demanded increase of rental for any quarter of the year beginning January 1, 1896, would, in case of no defendant, severally interested, and in the case of no defendants associated as partners, be as much as, but in each case very much less than $2,000. And in the case of the defendant having the largest number of acres of land irrigated under the system, would not equal $58.

The answer averred that the defendants have no information except as derived from the complainant's

bill and from the records of the Recorder's office of the County of San Diego, as to whether such corporation borrowed $300,000, or whether it was compelled to pay $21,000 interest annually thereon.

It averred payment to the complainant, as Receiver, at all time to January 1, 1896, of the rate or rental of $3.50 per acre, per annum, and the offer of the defendants to pay the same so long as it continues to be legally established.

The answer averred that the Statutes of the State of California of 1885, referred to in the bill and answer, in so far as it prohibits the creation of freehold easements and servitudes alleged in the answer, by contract between the corporation and consumers; and in so far as it purports to prohibit the making of contracts to extinguish, satisfy and make acquittance to the corporation of any right to net income and respecting annual rates, is void as in conflict with the 14th amendment of the Constitution of the United States, and that it is void as being in conflict with the declaration of rights contained in Section 1 of the Constitution of the State of California. And that it is void as being in conflict with Article 20, Section Nine of the Constitution of the State of California.

The answer further averred that certain defendants are not inhabitants or residents of the State of California; that certain three of them are public school corporations and not tax payers; and that certain of the defendants are not residents of the County of San

Diego, and therefore that said classes of defendants are incompetent to join in the petition of the Board of Supervisors under Section 3 of said Act of 1885.

And as to them the answer averred that such statute of March 12, 1885, is in violation of Section 1 of Article 14 of amendments to the constitution of the United States.

And the answer further averred that in and so far as such statute of 1885 purports to authorize or empower the corporation or its Receiver to shut off, or justify them in shutting off, as set forth in the bill, the water from the lands of these defendants to enforce the collection of the demanded increase of rental without permitting the defendants to have any standing in the court to test the reasonableness of such increase of rates, the same is void as being in conflict with Section 1 of Article 14 of the Constitution of the United States.

The answer further averred that the acts of the Receiver, as set forth in the bill of complainant, in undertaking to increase the rate of $3.50 per acre, per annum, for irrigation to $7, and in shutting off the water supply as alleged in the bill of complainant, are in violation of Article 5 of the amendments to the Constitution of the United States.

The answer further set forth the amendment of 1897 and the Act of 1885, which is copied in the appendix: and the answer further avers that by virtue of th provisions of the Constituion of he United States,

and of the State of California, and of such Act of the Legislature of March 13, 1897, the defendants had the right to enter into the contract set forth in the answer; that such contracts are valid and effectual and that the complainant had no right to make the demanded increase charge for use of water.

EXCEPTIONS OF COMPLAINANTS TO ANSWER.

To this answer, Lanning, as such Receiver, on September 22, 1897, filed "exceptions", six in number.

That numbered "first" is for alleged immateriality, irrelevancy and impertinency, and sets forth forty-four several passages of the answer as coming under it.

The general scope of this exception is to all the matters in the answer, to-wit:

Of averment that the water system involved, was at its completion, the private property of the San Diego Land & Town Company of Kansas; that this corporation granted to and invested each of the defendants with the ownership of water rights and freehold easements of the flow and use of water from its system as appurtenant to the lands owned respectively by them, and as constituting corresponding freehold servitudes on the water system; that the claims and demands of the coropration for the price or compensation for such water rights, easements and servitudes had been paid or otherwise satisfied; that by the sales, representations, agreements, contracts and acts set forth in the answer, the corporation had fixed the annual rate for irrigation under such water rights, easements and ser-

vitudes at the rate of $3.50 per acre, per annum; and that that was the only actual rate which has ever been established or collected by the corporation or its Receiver.

And that such rate has been uniform as to all lands irrigated under the system from the beginning of the water service; that such established rate induced the purchase, improvement and settlement of their lands by defendants; that the defendants each, have for more than five years held and enjoyed adversely the use of such water at such annual rate of $3.50 per acre, and that the corporation is barred by Section 318 of the Code of Civil Procedure of California from maintaining an action to increase the rate of the burden for the enjoyment of their easements; of denial that the corporation had the right to demand from the defendants water rentals beyond $3.50 per acre, per annum, to apply upon net income; of denial that the compensation for such respective water rights, easements and servitudes were or are subject to regulation by any Board of Supervisors of the State under the Act of 1885; of averment that the corporation required of defendants as a condition to the refraining by it from shutting off the supply of water under their respective water rights and easements, that they should subscribe an agreement, designated "application for water", which made such water right determinable by the corporation by service of a written notice on the first day of any succeeding July; of averment relying upon and invoking the application of Section 1, Article 14

and Article 5 of the amendments to the Constitution of the United States against the State statute of 1885, so far as it prohibits the contracts set forth in he answer; and assumes to authorize the increase of the established rate of $3.50 per acre, per annum, without the consent of the defendants; or assumes to authorize or justify the shutting off of water supply for irrigation as a means of enforcing the collection of the increased rate demanded; or, assumes to permit or authorize such enforced collection without allowing to the defendants any standing in the court to contest the reasonableness of such increase; or purports to empower any court to enjoin the defendants from contesting the reasonableness of such increase in any court; of averment relying upon the cited provisions of the Federal and State Constitution and the Act of the State Legislature of March 13, 1897, in favor of the right to make the contract for the water rights and water rates set forth in the answer, and to protect the vested interests created by such contracts.

The exception also extends to all matters of averment and denial in the answer, bearing on the allegation of the bill that the "sum of $7 per acre is a reasonable rate for consumers to pay, and the smallest amount for which said company can furnish the water without loss to it." (Trans. p. 11). The general scope of such parts of the answer, in addition to those involved in the contractural, statutory and constitutional considerations, just referred to are, among others; averments of the actual value of the system (Trans

p. 29), of its total irrigating capacity, of the proportion of the same not used and held by the corporation for speculation in connection with its lands for sale; averments of the accumulation from the then existing rates for the portion of the system actually used of a large surplus of money in excess of all expenses for management, operation and maintenance of the system. (Trans. p. 26); of denial that any increase of the annual rate of $3.50 per acre is at all necessary to enable the corporation to maintain and operate its water system, or to save the corporation from loss, or the plant from decay; also of averment going to show that the amount of the increase of rate in controversy between any defendant severally interested, or between any defendants jointly interested and the corporation was, and is, far below $2,000, as relating to the jurisdiction.

The second, third, fourth, fifth and sixth exceptions are as follows:

Second. That the defendants by their said answer aver and claim that they have by purchasing lands from the said San Diego Land & Town Company, and by the purchase of water rights from said Company, returned to it a part of its principal invested in its said water works, and that therefore they should not be required to pay rates upon a basis of allowing to said Company any interest on the amount of principal so advanced or returned to it, but said answer is evasive and uncertain, for that it does not show which, if any, of said defendants have so paid or advanced any of the

said principal, or how much thereof, if any, has been paid or returned to said Company by all of said defendants.

Third. That it is admitted by said answer that the actual and just cost of the water works and system of said San Diego Land & Town Company is $750,000.00, and the law of the State of California allows said Company, as a reasonable return on said investment, the sum of not less than six nor more than ten per cent net on the said value of said plant and system, and it affirmatively appears from said answer that the annual rental of $7.00 per acre, per annum, will not, and cannot, realize to said Company said sum of six per cent net per annum, allowed it by law.

Fourth. That with respect to all of the matters and things in said answer set forth, other than the allegations hereinabove set forth as irrelevant and impertinent, the denials and averments contained in said answer are evasive, imperfect and insufficient, and fail, either separately or as a whole, to show that the matters and things set forth in the bill of complaint are not true.

Fifth. That it appears affirmatively from the answer of the defendants that the complainant has legally established and is entitled to collect a water rental of $7.00 per acre, per annum, for the irrigation of the lands of the defendants and each of them respectively, and that it is entitled to collect said amount as alleged in the bill of complaint herein, unless said

rate is unreasonable; and it is further shown, and appears from said answer, that the defendants have no standing in this court, to contest the reasonableness of said rates, but that their remedy, if any they have, is to apply to the Board of Supervisors of the county in which their said land is situated to fix and establish said rates.

Sixth. That the said answer shows on its face that the complainant is legally and equitably entitled to charge and collect the rate of $7 per acre for the irrigation of the lands of the defendants, and that said rate is reasonable and just.

On Nov. 22, 1897, the court made a general and sweeping order sustaining such exceptions *en block*. (Trans. p. 61.)

ORDER SUBSTITUTING COMPLAINANT.

On November 16, 1897, the complainant, Lanning, served notice upon the defendants of motion for the discharge of himself as Receiver of the San Diego Land & Town Company of Kansas, and that the San Diego Land & Town Company of Maine be substituted as complainant in the suit in lieu of such Receiver, on the ground that all the property described in the bill had been sold by such Receiver to the Maine corporation, that the price had been received, the Receivership settled and closed, and that the Maine corporation had acquired all the right and title of the Kansas corporation to all of the property, and because the only party interested in the further liti-

gation of the question involved in this suit. (Trans. pp. 60-61.)

On December 6, 1897, the court made an order granting the motion and ordering that "the San Diego Land & Town Company of Maine be, and hereby is, substituted as complainant in said suit in lieu of the complainant (Lanning Receiver) above named"; to which ruling the record states, the defendants by their counsel asked and were allowed an exception. (Trans. pp. 61-62.)

ORDER THAT BILL BE TAKEN PRO-CONFESSO.

On the 20th day of December, 1897, the San Diego Land & Town Company of Maine served notice upon the defendants of a motion that the bill in the suit be taken *pro confesso* on the ground that defendants had not filed an amended answer within the time allowed.

On January 3rd, 1898, the defendants not having further answered, it was ordered that the bill be taken *pro confesso* against all the defendants.

DECREE

On February 12, 1898, without proofs, the court entered its decree in favor of the San Diego Land & Town Company of Maine, substituted as complainant in place of Lanning as Receiver, of the Kansas corporation, perpetually enjoining the defendants from prosecuting in the State courts or elsewhere separate actions against the San Diego Land & Town Company of Maine, to prevent it from collecting or enforc-

ing the collection of the rate of $7.00 per acre, per annum, for the irrigation of the lands of said defendants, fixed and established by the San Diego Land & Town Company (of Kansas) and by Charles D. Lanning, Receiver, as in the bill set forth until the establishment of rates by the Board of Supervisors of the County of San Diego, of the State of California, or the re-establishment thereof in accordance with law.

It was further decreed, that the Kansas corporation, and its Receiver, had the right to increase the amount of water rentals of the Company for water furnished to the lands of the defendants from $3.50 per acre, per annum, to $7 per acre, per annum; and that the defendants be required to pay the $7 rate for their lands irrigated from and after January 1, 1896, until the fixing of rates by such Board of Supervisors, or the re-establishment thereof, in accordance with law, as a condition upon which water should be furnished them, and that upon failure of the defendants or any of them to pay said rates, such substituted complainant was authorized to shut off the supply of water to such or any of the defendants who should fail for five days to make such payment, provided that the furnishing of water to the defendants for other purposes be not thereby interfered with; the decree also gave costs against the defendants. (Trans. p. 64.)

OBEDIENCE TO AND PERFORMANCE OF DECREE.

The bill of review alleges payment of the cost and obedience to and performance of the decree. It as-

signs errors in the proceedings and decree which are covered by the assignments of error annexed to the petition on appeal and the specification of errors set out in this brief.

DEMURRER.

To the bill of review of the San Diego Land & Town Company of Maine, on November 26th, 1898, filed a demurrer (fols. 138-39) alleging the following grounds:

"1. That it appears by the complainants' own showing in said bill that there is and was no error in the proceeding or decision of said court in th case of Charles D. Lanning, receiver of the San Diego Land & Town Company, vs. H. C. Osborne, mentioned and set forth in the bill herein, appearing on the face of the record or otherwise.

"2. That it appears from the complainants' own showing in their said bill that they are not nor are any of them entitled to the relief prayed for in their said bill or any relief.

"3. That it appears from their own showing by their said bill that there is no such error appearing on the face of the proceedings in the said suit of Lanning, receiver, vs. H. C. Osborne et al., or otherwise as can be delieved against by bill of review or a bill in the nature of a bill of review.

"4. That it appears from the complainants' own showing by their said bill that the remedy of the complainants, if any they have, is by appeal and not by bill of review."

The demurrer was by the court sustained on November 28th, 1898.

DECREE.

On the 5th of December, 1898, final decree was entered dismissing the bill with costs (fols. 147-152.)

APPEAL.

On the same day, to-wit, December 5th, 1898, the defendants filed their petition on appeal with assignments of error and the appeal to this court was allowed and thereafter perfected.

The decree in the original cause recites (fol. 102):

"That the complainant, San Diego Land & Town Company of Maine, is entitled to a final decree against said defendants in conformity to the opinion of the court filed herein September 14, 1896." (See 76 Fed. Rep. 319).

ULTIMATE QUESTIONS UPON THE MERITS.

The ultimate questions upon the merits, presented by the record upon this appeal are:

1. Is the original decree entered in form *pro confesso* manifestly erroneous, because not warranted under the statute law, by the allegations of the original bill?

Or more concretely—Upon the face of the original bill, was the rate of $3.50 per acre, per annum, for water supplied to defendants for irrigation, by the corporation, to be "deemed and accepted as the legally established rate thereof", under the proper construction of Sections 5 and 8 of the Act of the State Legislature

of March 12, 1885, instead of the rate of $7.00 per acre, per annum, as decreed?

2. Were the allegations of the answer which were expunged on exceptions for impertinence, material and pertinent in so far as they set forth contracts either express, or tacit and implied, for the creation of the respective irrigation water-rights, easements and servitudes claimed by defendants; and in so far as they set forth contracts, either expresss, or tacit and implied, fixing the annual rate for water furnished under such easements at $3.50 per acre; and was it error for the court to sustain such exceptions and thereupon to proceed to make its decree *pro confesso*?

And as germane to this question:—

Do the Constitution and statues of the State of California forbid such alleged contracts?

And if they do forbid such alleged contracts, are such state laws in conflict with the Fourteenth Amendment and with Article 4, Section 4 of the Federal Constitution; and is the decree in conflict with the Fifth and Fourteenth Amendments and with Art. 4, Sec. 4 of the Constitution?

3. If under the laws of the state, and notwithstanding the alleged contract rights of the defendants, and under the other circumstances set forth in the record, it was competent for the corporation and its receiver to supersede the $3.50 rate, and establish *any* higher rate, was the order, sustaining the first and fifth ex-